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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 264

DR. FREDERICK S. BALDI, SUPERINTENDENT,
PHILADELPHIA COUNTY PRISON

and

J. W. CLAUDY, SUCCESSOR TO STANLEY P. ASHE,
WARDEN, WESTERN STATE PENITENTIARY,
Petitioners

vs.

UNITED STATES OF AMERICA, EX REL.
DAVID ALMEIDA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Attorney General of Pennsylvania, on behalf of Frederick S. Baldi, Superintendent, Philadelphia County Prison, and J. W. Claudy, Warden, Western State Penitentiary, prays that a Writ of Certiorari issue to review the judgment entered in this case on March 27, 1952, by the United States Court of Appeals for the Third Circuit.

Opinions and Orders Below

1. The opinion of the Court of Oyer and Terminer of Philadelphia County, Pennsylvania (App'x. 424-450, 459-478), is reported in 66 Pa. D. & C. Reps. 351.

2. The opinion of the Supreme Court of Pennsylvania, affirming the judgment and sentence of the Court of Oyer and Terminer of Philadelphia County, Pennsylvania (App'x. 575-642), is reported in 362 Pa. 596, 68 A. 2d 595.

3. The order of the Supreme Court of Pennsylvania refusing a rehearing (App'x. 657) is not reported.

4. The order of the Supreme Court of Pennsylvania refusing a petition for a new trial, under the Act of April 22, 1903, P. L. 245, 19 Purdon's Penna. Statutes Annotated, Section 861 (App'x. 662) is not reported.

5. The order of the Supreme Court of the United States denying certiorari (App'x. 692-693) is reported at 339 U. S. 924.

6. The order of the Supreme Court of the United States denying a rehearing (App'x. 694) is reported at 339 U. S. 950.

7. The order of the Supreme Court of Pennsylvania refusing a writ of habeas corpus (App'x. 718) is not reported.

8. The order of the Supreme Court of the United States denying certiorari (App'x. 746-747) is reported at 340 U. S. 867.

9. The opinion of the District Court (R. 389-409) is reported at 104 F. Supp. 321.

10. The opinion of the Court of Appeals (R. 412-439) is reported at 195 F. 2d 815.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 27, 1952 (R. 441). On June 18, 1952, Mr. Justice Burton, on application of the Petitioner, entered an

order extending the time in which to file a petition for certiorari to and including August 11, 1952 (R. 440). The jurisdiction of this Court is invoked under Section 1254 (1) of The Judicial Code, 28 U. S. C. Section 1254 (1).

Questions Presented

1. Whether a Federal District Court should entertain an application for a writ of habeas corpus challenging the Federal constitutional validity of a State criminal judgment on grounds presented to and adversely decided by (1) the trial court and the highest State appellate court on direct appeal, and (2) the highest State court in a collateral post conviction proceeding and this Court declined to review both proceedings?

2. Whether habeas corpus in the Federal Courts is an appropriate method of securing a review of State Court determinations concerning the materiality of evidence in a criminal proceeding?

3. Whether, in a habeas corpus proceeding challenging the constitutional validity of a State criminal judgment, the Federal Courts are not required to follow the law of the case as established by the prior litigation in the State Courts?

4. Whether the conclusion that Respondent was denied due process of law in the proceedings culminating in the criminal judgment was not based on clearly erroneous findings?

Statutes and Constitutional Provision Involved

Constitution of the United States
Amendment XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Judicial Code, 28 U. S. C.

"§ 2241. Power to grant writ

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * * * * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless —

* * * * * * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; . . ."

"§ 2254. State custody; remedies in State courts.

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Rules of Decision Act

Act of June 25, 1948, c. 646, 62
Stat. 944, 28 U.S.C.A. Section 1652

"§ 1652. State laws as rules of decision

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The Penal Code

Section 701, Act of June 24, 1939
P. L. 872, 18 Purdon's Penna. Statutes Annotated
Section 4701

"Section 701. Murder of the First and Second Degree. All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree. All other kinds of murder shall be murder in the second degree. The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is quilty of murder of the first or second degree. * * *

"Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict. The court shall impose the sentence so fixed, as in other cases. * * *"

New Trial on Ground of After-Discovered Evidence

Section 1, Act of April 22, 1903
P. L. 245, 19 Purdon's Penna. Statutes Annotated
Section 861

"Whenever by petition, supported by after discovered evidence, it shall be made to appear to the supreme court that there is ground for substantial doubt as to the guilt of any prisoner convicted of murder of the first degree, the said court shall have power to authorize the court of oyer and terminer in which such prisoner has been convicted to grant a rule for new trial, nunc pro tunc, notwithstanding the expiration of term in which such prisoner was convicted and sentenced; and thereupon the said court of oyer and terminer may, in its discretion, grant and proceed to hear such rule, as in other cases."

Statement

This case presents a most extraordinary situation--the invalidation of a State criminal judgment by a single District Judge on grounds which were presented to and determined by the State courts in direct proceedings following the verdict, and in a collateral habeas corpus proceeding following the affirmance, both of which this Court declined to review.

On January 30, 1947, five and one-half years ago—the Respondent, David Almeida, Edward Hough and James Smith, agreed upon a plan to commit armed robbery. They armed themselves with pistols and revolvers of various sizes,[1] went to a public garage, intimidated the garage

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[1] The evidence in the various trials indicates that the Respondent and Hough were armed with .45 caliber weapons. A .22 caliber revolver was found in the abandoned getaway auto with which the District Judge assumed that Smith was armed (R. 400). Hough, in his statement given to the police about nineteen hours after the affair (App'x. 802-816) said (App'x. 813) he did not know whether Smith had one or two guns. The Court of Appeals was more reserved. On this point, they observed (R.

attendant by a display of their firearms and physical force, stole a coupe automobile, and drove to and parked at the curb near the entrance of a large grocery mart—the selected victim. Hough and the Respondent disguised themselves and entered the store. Smith remained at the auto. Hough removed money from two cash registers while the Respondent covered the customers and clerks, during which he fired two shots into the ceiling. Nearby police had been alerted and were speeding to the scene as Respondent and Hough fled from the store and entered the stolen vehicle. Just at that time, Cecil Ingling, a police officer, who was off duty and attired in civilian clothing, returned to his auto which was parked directly in back of the bandits' vehicle. Apparently, apprehending that the Respondent and his companions were engaged in wrongful conduct, Ingling instinctively attempted to do what he could to bring them to book by seizing Hough. While grappling with Hough, Ingling was shot through the head and fell to the pavement mortally wounded. Then, the police, who were armed with .38 caliber S & W Special revolvers, fired at the bandits. Smith was wounded. The bandits, however, managed to elude the police and sped from the scene with the police in pursuit. A short distance from the locale of the crime, Hough fell out of the bandits' vehicle and was immediately apprehended. The Respondent and Smith escaped and were not apprehended until several months later, following their robbery of a National Bank in Louisiana, for which they were convicted and sentenced to thirty-five years in a Federal penitentiary.

Respondent, Hough and Smith were all jointly indicted

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414) "From the evidence at Almeida's trial it appears that Smith was armed with a .22 caliber revolver . . ." When Respondent was arrested, several months later, two .38 caliber revolvers were found in a suit case together with currency which he and Smith had stolen from a National Bank in the room which the Respondent was occupying. (R. 384)

for murder. Hough pleaded guilty to murder generally. At his trial, Leon Ingling (App'x. 764) and Jean Ingling (App'x. 766), children of the slain police officer and eye witnesses to the crime, testified that it was the occupant of the center seat position who shot and killed their father. Leon identified him as Smith. Hough was found guilty of murder in the first degree by a three judge court (App'x. 872-879), and was sentenced to death (App'x. 879-880). The judgment and sentence were affirmed by the Supreme Court of Pennsylvania (App'x. 881-889, opinion reported at 358 Pa. 247, 56 A.2d 84.

Following the conviction of Respondent and Smith in Louisiana, they were returned to Pennsylvania for trial on the murder indictment. Respondent pleaded not guilty. At his trial, Mrs. Ingling (App'x. 293, 294, 296, 297) and her two children, Leon (App'x. 301, 302 303) and Jean (App'x. 299, 300)—all eye witnesses—testified that it was Smith, the occupant of the middle seat position (App'x. 296, 300), who shot and killed Ingling.[2] Hough testified that it was Respondent who was the "middleman" and who shot and killed Ingling (App'x. 79), and that Smith who was driving (App'x. 79, 81, 102) was injured in the head during the gun battle between the bandits and the police officers (App'x. 78-79). Dr. Yates testified that he had treated Smith about three hours after the crime (App'x. 309), for a superficial wound on the forehead above the left eye, not involving the periosteum (the outer covering of the bone) (App'x. 310) which was about a quarter of an inch wide and two and one-half inches long (App'x. 312). Dr. Wadsworth, the Coroner's physician, who performed the autopsy on Ingling, testified that the bullet which caused death had passed

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[2] Mrs. Ingling also testified (App'x. 292) "As the officer [the first police officer to arrive at the scene] pulled in, put on his brake and put his car in neutral, the poor devil [Ingling] disappeared, because of what I thought was backfire which was a shot."

completely through his head (App'x. 17); that he could not, with any degree of accuracy, tell the caliber of the bullet (App'x. 18) but that it was probably less but not much less than the wound of entrance—10 mm. (App'x. 17); and that the fatal shot was fired from a minimum distance of three feet (App'x. 20) which corroborated the testimony of Jean Ingling (App'x. 299) that her father's assailant was about four feet from him when he shot.

The jury found Respondent guilty of murder in the first degree, and fixed the penalty at death (App'x. 411-412). The trial judge was satisfied that justice had been done (App'x. 413-416).

A few days later, Smith, the remaining conspirator, represented by other counsel, went to trial before another judge and jury on a plea of not guilty. The evidence was substantially the same as that given at the trial of the Respondent except (1) Hough testified that Ingling was shot *before* the police opened fire (App'x. 1002, 1003, 1022), (2) Lieutenant Spangler, police ballistics expert, who was called by the Commonwealth at the request of the defense (App'x. 1315) testified that Police Detective Ahrndt, on the second day following the crime, submitted to him a spent .38 caliber S & W Special bullet [3] which would fit a police weapon and which he examined (App'x. 1282-1283) and *himself* (App'x. 1292) took to the police chemist, (App'x. 1294), (3) Police Detective Ahrndt who was also called at the request of the defense (App'x. 1302) testified that a short time

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[3] This is the bullet which is the very predicate of this proceeding. This is the bullet which Respondent's witness, Lieutenant Del Torre, who had succeeded Spangler following his retirement, as the police ballistics expert, testified did not kill Ingling (R. 129, 130, 132). This is the bullet Dr. Wadsworth, Coroner's physician for fifty-three years (R. 311-312) and who in the course of his professional career had performed about 14,000 autopsies (R. 312), and who had performed the autopsy upon Ingling, categorically testified (R. 313-314) did not kill Ingling and this testimony was not contradicted.

after the commission of the crime he had found a spent bullet on the pavement "directly as you come out the door"[4] (App'x. 1301), which he, on the following day, took to Spangler, the ballistics expert (App'x. 1301). He also testified that he did not know how it got there (App'x. 1300), or how long it had been there (App'x. 1300, 1301), or when it was fired (App'x. 1300, 1301). (At the conclusion of Ahrndt's testimony, the Prosecuting Attorney objected to it and asked that it be stricken from the record "for the reason there is no evidence how the bullet came there, from whence it came, how long it was there, or anything else, it connects no one." (App'x. 1302). The trial judge replied (App'x. 1302): "That is all right, the jury will understand."), (4) Dr. Lampert, the Police Chemist, the only witness called by the defense, testified that Spangler had submitted to him *a* bullet (App'x. 1311), and that there was blood upon it (App'x. 1311) and (5) Police Detective Morris, on cross-examination (App'x. 1243-1246), read a statement which he had taken about three hours after the crime from Officer McGinley who, the Respondent has claimed, fired the fatal shot in which McGinley stated (App'x. 1244), "I got out of my car and pulled my gun and I saw one man trying to get in the driver's side of the

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[4] Strangely, this fact, it was asserted in the Respondent's brief sur motion for a new trial (App'x. 1323), brief sur appeal (App'x. 485), petition for certiorari (App'x. 669), petition for habeas corpus in the Supreme Court (App'x. 699) and the District Court (R. 7) raised a very strong inference that Ingling was killed by a bullet from a police officer's weapon because "if a line were drawn from the place where McGinley was standing when the shooting took place, thence to where Ingling was standing when he was shot, and then to where the bullet was found, such a line would be a straight one" and because it was "a natural resting place for the bullet which had passed through Ingling's head." At the hearing in the District Court, Ahrndt, a witness for Respondent, however testified (R. 56) that he found this bullet *ten feet east of the door* "directly on a line where the body was laying." This material variance, alone, completely shatters the Respondent's theory as presented in his application to the District Court.

holdup car which was a blue coupe and so I fired from behind my car and he fell to the ground. He may have ducked." Smith was found guilty of murder in the first degree with life imprisonment.

A motion for a new trial was filed, assigning as reasons therefor, inter alia, (Pars. 10, 11 and 12, App'x. 422-424) that Respondent had been denied his constitutional right to a fair and impartial trial as the result of the prosecutor's failure to produce evidence at his trial which had been produced at the subsequent trial of Smith, his co-defendant. The issues raised in the motion were presented to the court en banc, composed of Carroll, J., the trial judge, MacNeille, P. J., and Gordon, P. J., in written form (App'x. 1337-1343), and oral argument (App'x. 434, R. 182, 185, 186, 191, 192). A new trial was refused (App'x. 424-450), Gordon, P. J., dissenting (App'x. 459-478), opinion reported at 66 Pa. D. & C. Reps. 351. Judge Carroll, speaking for the majority (App'x. 434), said: "In proper time following the verdict a motion for new trial was filed on the basis of alleged errors in the charge, viz., *the failure of the Commonwealth to call certain witnesses and to produce certain evidence. . . . We have had the benefit of oral argument and written briefs on all the points thus raised and have given them the careful consideration which our duty commands and our conscience dictates. After the fullest deliberation a majority of the court has come to the conclusion that the reasons advanced are insufficient for us to set aside the jury's verdict and accordingly the defendant's motion must be denied.*" (Emphasis supplied) President Judge MacNeille concurring (App'x. 444), said: "*Defendant has filed some thirteen reasons for a new trial. Each has been carefully considered and has been found to be without merit.*" (Emphasis supplied)

An appeal was then taken to the Supreme Court of Pennsylvania (App'x. 1-539) in which the Respondent referred

at large in his history of the case (App'x. 485), and argument (App'x. 526, 527, 531) to the evidence in Smith's trial. The trial court's overruling of Reasons, 10, 11 and 12, for a new trial which alleged denial of the constitutional rights on the very ground asserted in the District Court were assigned as error (App'x. 492-495). The Statement of Questions Involved (Pars. 3, 4, App'x. 481) specifically comprehended those assignments which were argued in the Respondent's brief (App'x. 523-532)[5] and orally to the court (R. 191, 192, 195). They were also argued by the prosecutor (Par. 4, App'x. 562-568) in his brief, at least, and it is presumed that he also argued them orally. (The prosecuting attorney died before the collateral proceedings were instituted in any of the courts.)

The Supreme Court of Pennsylvania considered the facts set out in the History based on the Smith Case[6] and in an

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[5] "It might be argued, if the defendant's first error is dismissed, that it would make no difference whether the bullet which killed Ingling was from a policeman's gun or not. However, even conceding this point on the law, there is no doubt that such *would have affected the penalty.* The verdict in the Smith Case proves this conclusively, as does also the fact that the jury in the Almeida Case was out two hours, and the jury in the Smith Case out about sixty-eight hours." (App'x. 528)

"Since the theory of the defendant's case was that the fatal bullet was not fired by the three hold-up men, but rather mistakenly by a policeman, and that this fact either eliminated the element of murder in the first degree or should be considered in reducing the penalty from death in the electric chair to life imprisonment, it is easy to see how important this evidence was to the defendant." (App'x. 530, 531)

[6] This is evident from the statement in the opinion (App'x. 577) "In behalf of Almeida his counsel cite certain *facts* which they contend 'raise the very strong inference that the fatal shot was fired mistakenly by a policeman' ", which was taken from the following statement in Respondent's History of the case (App'x. 485): "At the trial of Smith, Lieutenant Spangler of the Philadelphia Detective Bureau testified that a .38 calibre bullet was found in back of the place where Ingling had been standing when shot; and Dr. Lambert, employed as a chemist by the City of Philadelphia, testified that there was blood on the .38 calibre bullet (Smith's Trial, N. T. 362). If a line were drawn from the place where McGinley was standing when shooting, thence to where Ingling was standing when he was shot, and thence to where the bullet was found, such a

exhaustive opinion (App'x. 575-634) overruled *all* assignments of error (App'x. 633) and remitted the record "to the court below so that the *sentence* imposed may be carried out" (App'x. 633). (Emphasis supplied) An exhaustive petition for reargument (App'x. 643-656) was filed in which it was alleged that the opinion of the Supreme Court failed to discuss the assignments of error and the section of the Respondent's brief "concerning suppression of evidence" (App'x. 643, 644) and "As the assignments of error point out, the suppression of evidence in this case constitutes a denial of petitioner's [Respondent's] constitutional rights" guaranteed by the Constitution of Pennsylvania and the Fourteenth Amendment of the Constitution of the United States (App'x. 644). Simultaneously, a petition for a new trial, under Section 1 of the Act of April 22, 1903, P. L. 245, 19 Purdon's Penna. Statutes Annotated 861, was filed in the same court (App'x. 658-661). Both petitions "having been considered by the court" were refused (App'x. 657, 662).

The Respondent then filed in this Court a petition for certiorari (App'x. 664-691), in which under the caption "Summary Statement of the Matter Involved" (App'x. 664-677), extensively set forth all of the pertinent facts upon which the contention of "suppression of evidence" was based. He stated (App'x. 674-677): "Petitioner [Respondent] filed additional reasons in support of a new trial after the Smith trial was completed . . . since by then it was apparent that the prosecuting authorities had suppressed vital evidence at petitioner's trial. . . . In his appeal to the Supreme Court of Pennsylvania, petitioner [Respondent] charged in assignments of error, four through seven, that his conviction and sentence of death, after a trial

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line would be a straight one. *It would raise the very strong inference that the fatal shot was fired mistakenly by a policeman.*" (Emphasis supplied.)

marred by the prosecuting authorities' *suppression of material evidence,* denied to him the rights preserved by the Fourteenth Amendment to the Constitution of the United States. . . . Moreover, petitioner's [Respondent's] counsel stressed this issue at pages 40 to 48 of his brief before the Pennsylvania Supreme Court. . . . Petitioner [Respondent] filed . . . a petition for reargument and a petition for a new trial because of after-discovered evidence. . . . Those *petitions again urged that the conviction and sentence of death after a trial at which material evidence had been suppressed by the prosecuting authorities was in violation of the constitutional rights under the Fourteenth Amendment to the Constitution of the United States. . . . The evidence was material, if not to the guilt then to the punishment of petitioner* [Respondent]." (Emphasis supplied) As a basis of this Court's jurisdiction, it was asserted (App'x. 678): "In the Supreme Court of Pennsylvania petitioner [Respondent] *specifically claimed under the Fourteenth Amendment of the Constitution of the United States his right not to be deprived . . . of his life . . . without due process of law.*" Only one question was presented in the petition for certiorari (App'x. 678) viz., "*Does suppression of evidence by the prosecuting authorities in a capital case, when such evidence is material to fixing the sentence at either life imprisonment or death,* deprive the petitioner [Respondent] of his life and his right to a fair trial without due process of law as preserved to him by the Fourteenth Amendment to the Constitution of the United States?" (Emphasis supplied) It was stated therein, under the caption "Reasons Relied Upon for Allowance of Writ" (App'x. 679), "This case raises an important constitutional question in the state administration of criminal law which has never been squarely passed upon by this Court. *The Supreme Court of Pennsylvania has decided this substantial federal question* contrary to the

analogous decisions of this Court, and has affirmed a judgment and sentence of death on the basis of a record clearly violative of due process." (Emphasis supplied)

Certiorari was denied (App'x. 692-693). A petition for rehearing (App'x. 1379-1391) was then filed in which it was stated, inter alia, (App'x. 1383-1384) the Respondent "*moved for a new trial on the basis of suppressed evidence.* . . . The plea was addressed to the court *en banc* and *to the Pennsylvania Supreme Court on two occasions.* . . . In his petition for reargument and his motion for a new trial, based on after-discovered evidence, *petitioner* [*Respondent*] *then pointed out to the Supreme Court that even though the killing might have been murder, the introduction of the evidence that was suppressed would undoubtedly have resulted in a different penalty.* . . . Finally, this Court was asked to review the case *solely on the ground that a brazen suppression of evidence by the prosecution in a case like this contravenes the rule requiring that one should not be deprived of his life without due process of law.*" "The petitioner [Respondent] now asks *for the last time* that he be given a trial in which *all the material facts* may be judged fairly." (Emphasis supplied) The rehearing was refused on May 1, 1950, 339 U. S. 950.

An application for commutation of sentence was filed with the Pennsylvania Board of Pardons, and the issue of suppression of evidence argued (R. 188). Before the application was decided, the Respondent filed a petition for a writ of habeas corpus in the Supreme Court of Pennsylvania (App'x. 695-709), in which there was set forth *all* of the pertinent facts and averring, inter alia, (1) he was confined "under sentence of death unlawfully imposed in violation of the due process clause of the Fourteenth Amendment to the United States Constitution" (Par 1 App'x. 695-696); (2) "This Court affirmed the conviction (362 Pa. 596) but did not pass on the matters raised in this Peti-

tion" because the "pertinent facts were not in the record of Relator's [Respondent's] trial, and therefore were not before this Court" (Par. 1, App'x. 696); (3) "The facts herein alleged perhaps raise no doubt as to Relator's [Respondent's] guilt but *go only to the issue of whether Relator's [Respondent's] trial was so fundamentally unfair as to oust the jurisdiction of the court and whether facts bearing on penalty were suppressed*" (Emphasis supplied) (Par. 1, App'x. 696); (4) "To this day no court and no opinion writer has answered the serious question which Relator [Respondent] raised by this petition nor have the facts ever been denied by his adversaries" (Par 1, App'x. 696); (5) "The facts which follow were brought out at the trial of Smith. After Ingling was removed to the hospital *Detective Ahrndt found a spent bullet on the pavement directly outside the door of the market, a natural resting place for the bullet which had passed through Ingling's head.* The next day he took the bullet to Lieutenant Spangler, the police ballistics expert, for ballistics examination (Smith R. 361, 362). Lieutenant Spangler examined the bullet and found that it was a .38 S & W Special which would fit a police Special .38 (Smith R. 346, 347). Lieutenant Spangler promptly took the bullet to Doctor Charles Lampert, the police chemist, who examined it and found that 'There was blood upon that bullet' (Smith R. 356, 371). Although the prosecution knew the facts stated in the preceding paragraph before Relator's [Respondent's] trial, and also knew that *only* the police carried .38 caliber weapons, the prosecution kept the names of the police ballistics expert and the police chemist off the list of witnesses endorsed on the Bill of Indictment." (Emphasis supplied) (Pars. 6, 7, 8, App'x. 699-700); (6) "The action of the prosecution in suppressing that evidence and each part of it was fundamentally unfair . . . It ousted the jurisdiction of the trial court to proceed to verdict and judgment of sen-

tence . . ." (Par. 19, App'x. 703); (7) "Relator's [Respondent's] trial centered around the issue of which penalty should be imposed for murder of the first degree. *Therefore, the suppressed evidence was material even if it is the law that Relator [Respondent] is guilty of first degree murder on a showing that a police officer killed Ingling . . .*" (Emphasis supplied) (Par. 20, App'x. 703-704); (8) "*In Pennsylvania the jury actually fixes the penalty for first degree murder . . . If the suppressed evidence had been known to the jury at Relator's [Respondent's] trial, there would have been a strong probability that the jury would have fixed the penalty at life imprisonment* . . . The jury in Smith's case did exactly that when the defense in that case succeeded in piercing the iron curtain behind which the prosecution had concealed *material evidence.*" (Emphasis supplied) (Par. 21, App'x. 704); (9) "It is the law of Pennsylvania that in a first degree murder case the jury is entitled to know *all* the circumstances of the crime in order to exercise the *discretion* which the Act of June 24, 1939, P. L. 872, sec. 701, 19 P. S. 4701, gives the jury in fixing the penalty. Commonwealth v. Wooding, 355 Pa. 555, 559. *By wilfully suppressing evidence of the material facts,* which evidence was not cumulative, *the prosecution prevented Relator's [Respondent's] jury from knowing all the circumstances. This action on the part of the prosecution violated the due process clause of the Fourteenth Amendment to the Constitution of the United States and ousted the jurisdiction of the trial court to proceed to verdict and judgment of sentence.*" (Emphasis supplied) (Par. 29, App'x. 706)

An answer to the petition for a writ of habeas corpus (App'x. 710-717) was filed averring, in substance: (1) the isssue raised by the petition was res judicata and (2) the evidence alleged to have been suppressed was irrelevant and immaterial. After full oral argument, the Court en-

tered a per curiam order (App'x. 718) as follows: "We are of the opinion that the matters complained by the Relator [Respondent] do not warrant the granting of a Writ of Habeas Corpus. Writ refused." A stay of execution was also refused (App'x. 722).

On the same day, without even seeking a stay from this Court, the Respondent instituted a proceeding in the District Court by filing the identical petition which had been presented to the Supreme Court of Pennsylvania (R. 1-16, 19-22). A rule to show cause and stay issued (See R. 17-18). An answer (R. 23-25) was filed averring in substance (1) the matters complained of had been presented to and determined by the State Courts and this Court had declined review and (2) the evidence alleged to have been suppressed was irrelevant and immaterial. After argument, the District Judge entered an order (R. 26-27) reciting that the requirements of Darr v. Burford, 339 U. S. 200, had been met and that he would "continue jurisdiction of the case until the Rule to Show Cause shall have been disposed of and a decision on the merits rendered after Relator's [Respondent's] Petition for Certiorari has been disposed of by the Supreme Court of the United States in Commonwealth ex rel. David Almeida v. Dr. Frederick S. Baldi . . . which is docketed at 361 Misc. Docket No. 9 in the Supreme Court of Pennsylvania" and stayed Respondent's execution.

A Petition for Certiorari (App'x. 724-745) was then filed in this Court. It was averred therein, inter alia: (1) "In the Supreme Court of Pennsylvania, Petitioner [Respondent] specifically set up and claimed, under the Fourteenth Amendment of the Constitution of the United States, his right not to be deprived by the Commonwealth of Pennsylvania of his life and liberty without due process of law (Pars. 1, 19, 29, 31, 34 . . .)" (App'x. 735); (2) "It is clear that habeas corpus was not denied on the purely state

ground that it was not an appropriate remedy" (App'x. 734); (3) "Accordingly this case falls squarely within the scope of Rule 38 (5) (a) of this Court, being a case where the state court has decided a Federal question of substance never heretofore determined by this Court and has decided it in a way not in accord with the decisions of this Court most nearly analogous" (App'x. 737-738). The petition was denied October 23, 1950 (App'x. 746-747).

A petition to convene a full bench (R. 28-32) to hear argument on Petitioner's Motion to Discharge the Rule to Show Cause (R. 40-44) was filed. No formal action was taken on that petition. The motion to discharge the rule was dismissed. A hearing was had (R. 52-388).

Notwithstanding Respondent vouched for the credibility of Lieutenant Del Torre—his own witness, and, notwithstanding the satisfaction of the District Judge and counsel for the Respondent with the credibility of Dr. Wadsworth (R. 321-322), and, notwithstanding that the District Judge felt that he (Dr. Wadsworth) could "throw more light on this than anyone I know" (R. 329), the District Judge ignored their clear, positive and uncontroverted testimony (R. 129, 130, 132, 313, 314) that the controversial bullet was *not* the bullet which killed Ingling and made the startling conclusion (Par. 6, R. 407) which the Court of Appeals labeled a "Finding of Fact" that this bullet "would have warranted the inference that a uniformed police officer fired the shot which killed Ingling."[7] The District Judge concluded (Par. 6, R. 407) that this evidence was material and that the Prosecuting Attorney had wilfully suppressed it at Respondent's trial in violation of rights secured to

[7] This conclusion was based in part on Finding No. 25 which placed an unwarranted interpretation on Del Torre's use of the word "mushroom" (R. 150-151) and totally ignored Dr. Wadsworth's testimony (R. 326) that the bullet was *not* "mushroomed", as well as the fact that the report of Spangler (R. 83-84), which the Respondent introduced, contains *no* reference to "mushrooming."

him by the Fourteenth Amendment of the Constitution of the United States (Par. 7, R. 407), and invalidated the criminal judgment (Pars. 9 and 10, R. 407-408, 409-410).

The Court of Appeals affirmed, holding (1) the findings of the District Judge were supported by ample evidence,[8] (2) the District Judge did not erroneously exercise jurisdiction and (3) the law of the case, as established by the prior litigation in the State Courts and this Court, was of no legal consequence.

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In affirming the judgment of the District Court.

2. In holding that the issue of suppression of evidence was not raised in the trial court on the application for a new trial.

3. In holding that the trial court, on the application for a new trial, disregarded the evidence produced at the subsequent trial of Smith—the Respondent's accomplice.

4. In holding that the Supreme Court of Pennsylvania did not consider the Respondent's contentions concerning the alleged suppressed evidence on the direct appeal and the ancillary proceedings.

5. In holding that the Supreme Court of Pennsylvania did not adjudicate the issue of the alleged suppression of evidence in the post conviction habeas corpus proceeding.

6. In holding that the denial of certiorari by this Court on two occasions, when the very issue upon which the judg-

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[8] This was a departure from its prior decision in Johnson v. Dye, 3 Cir. 175 F. 2d, 250, where Chief Judge Biggs, the opinion writer in this case, speaking for the Court, said (p. 255): ". . . upon appeal in a habeas corpus case all questions of law or fact arising upon the record, including the evidence, are open to consideration by the appellate court and the trial court has no authority to make conclusive findings of fact as in the ordinary action . . . and we are not bound by the conclusions of the trial court . . . the hearing before this court is technically de novo."

ment of the District Court was based, was presented to it, was of no legal significance.

7. In holding that, contrary to the law of the case, as established by the prior litigation, and prior State decisions, who killed Ingling was relevant to the issue of the penalty to be imposed by the jury.

8. In holding that there was ample evidence in the record to support the finding that the Prosecuting Attorney deliberately and wilfully suppressed, at Respondent's trial, material evidence which would have warranted the inference that a uniformed police officer fired the shot which killed Ingling.

Reasons for Granting the Writ

The most unusual and extraordinary action of the District Judge, in this case, striking down a State criminal judgment on grounds presented to and rejected by the State tribunals in both direct and collateral proceedings, both of which this Court declined to review, in the teeth of positive, credible and uncontroverted evidence convincingly demonstrating beyond peradventure that the hypothesis of the application was totally nonexistent, constitutes a serious and unwarranted intrusion into and interruption of the orderly and regular administration of criminal justice in the State Courts. It renders all prior proceedings in this Court as well as the State Courts meaningless and nugatory and relegates them to mere time consuming devices. The affirmance by the Court of Appeals, in effect, holds that a District Judge has supervisory powers over the State Courts and this Court, contrary, the Petitioners feel, not only to the decisions of this Court[9] but also the over-

[9] *Frank* v. *Mangum*, 237 U. S. 309; *Ashe* v. *Valotta*, 270 U. S. 424; *Darr* v. *Burford*, 339 U. S. 200; see also *House* v. *Mayo*, 324 U. S. 42, 48; *White* v. *Ragen*, 324 U. S. 760, 764-765; *Salinger* v. *Loisel*, 265 U. S. 224; *Wong Doo* v. *United States*, 265 U. S. 239.

whelming weight of authority in other Federal jurisdictions,[10] and the true intent of Congress in conferring jurisdiction upon the Federal Courts in habeas corpus proceedings.[11]

1. Neither the opinion nor the findings of the District Judge reflect the restraint and caution which this Court has reiterated time and again should be exercised in a situation of this nature. The District Judge obviously was of opinion that the decision of this Court in Darr v. Burford, 339 U. S. 200, merely established a meaningless and inconsequential procedural impediment, *not* to the assumption of jurisdiction, but to a full-fledged inquiry into the truth of the bases of the application. The Court of Appeals was more cautious. They avoided the application of prior decisions of this Court by holding (1) the issue presented in the application to the District Judge—suppression of material evidence—was not presented to the trial court on motion for a new trial[12] (R. 417), and, if it were,

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[10] 2 Cir. *Monsky* v. *Warden of Clinton State Prison*, 163 F. 2d 978, cert. den. 332 U. S. 848; *Morrison* v. *Foster*, 175 F. 2d 495, 497; *Steele* v. *Jackson*, 171 F. 2d 432, cert. den. 336 U. S. 939; *Schechtman* v. *Foster*, 172 F. 2d 339, cert. den. 339 U. S. 924.

4 Cir. *Brown* v. *Allen*, 192 F. 2d 477; *Goodman* v. *Swenson*, 173 F. 2d 349; *Adkins* v. *Smyth*, 188 F. 2d 452; *Bernard* v. *Brady*, 164 F. 2d 881, cert. den. 332 U. S. 856; *Haughey* v. *Smyth*, 170 F. 2d 68; *Goodwin* v. *Smyth*, 181 F. 2d 498; *Edmondson* v. *Wright*, 177 F. 2d 719, cert. den. 338 U. S. 944; *Holiday* v. *State of Maryland*, 177 F. 2d 844; *Speller* v. *Allen*, 192 F. 2d 477; *Daniels* v. *Allen*, 192 F. 2d 763.

5 Cir. *Bailey* v. *Stoutamire*, 155 F. 2d 754; *Frazier* v. *Ellis*, 196 F. 2d 231.

7 Cir. *Parker* v. *Carey*, 135 F. 2d 205, 320 U. S. 755; *Weber* v. *Ragen*, 176 F. 2d 579, cert. den. 338 U. S. 809; *Holderfield* v. *Ragen*, 170 F. 2d 189, cert. den. 336 U. S. 906.

8 Cir. *Mart* v. *Lainson*, 169 F. 2d 1016.

9 Cir. *Bird* v. *Smith*, 175 F. 2d 260; *Moore* v. *Smith*, 164 F. 2d 483.

[11] See *Parker, Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 173-174, 178; *Frank* v. *Mangum*, 237 U. S. 309, 329.

[12] In addition to ignoring the testimony of Respondent's trial counsel (R. 182), as well as *all* of the reasons for a new trial, Nos. 10, 11 and 12

the trial court disregarded the evidence (R. 428) upon which it was based because it was technically not a part of the record[13] (R. 428), (2) the issue presented to the District Judge—suppression of material evidence—was not raised[14] in the Pennsylvania Supreme Court (R. 417-418) and they "were not certain whether the Court passed on the question raised by the evidence relating to the .38 caliber bullet[15] (R. 418), and (3) although "the issue of intentional suppression of pertinent and vital evidence" and "fundamental fairness" were explicitly raised in the habeas corpus proceeding in the Pennsylvania Supreme Court (R. 419), the per curiam opinion of that Court[16] was not an adjudi-

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(App'x. 492-494), the Respondent's Petition for Certiorari in this Court (App'x. 675) and Petition for Rehearing (App'x. 1383) they drew an exceedingly fine distinction between "failure to produce" and "suppression."

[13] This ignores *Commonwealth* v. *Daily* (No. 2) 280 Pa. 59, 65-66, 124 Atl. 440. Moreover, it ignores the practice in Pennsylvania to raise *all* matters on motion for a new trial which were formerly raised in coram nobis (*Commonwealth ex rel.* v. *Ashe*, 28 Pa. D. & C. Reps. 573, 575). The issue raised by this evidence, if it had the effect under Pennsylvania law which the Court of Appeals has attached to it, might, after the expiration of the term, have been raised in coram nobis (see *Commonwealth* v. *Harris*, 351 Pa. 325, 327, 41 A. 2d 688) were it not for the fact that the Act of April 22, 1903, P. L. 245, 19 Purdon's Penna. Statutes Annotated Section 861 has replaced it in first degree murder cases (*Commonwealth* v. *Harris*, 351 Pa. 325, 342, 41 A. 2d 688, supra). There is no reason, therefore, technically or otherwise, why the "evidence" was not before the trial court on motion for a new trial. It was, and, indeed, it was considered, as clearly evidenced by the Court's opinion (App'x. 434).

[14] This ignores Respondent's Petition for Reargument (App'x. 643, 644), his Petition for Certiorari (App'x. 674-679) and his Petition for Rehearing (App'x. 1383) in this Court.

[15] This ignores both the matters pointed out in footnote 6, supra, and the Respondent's statements in his Petition for Certiorari in this Court (App'x. 679), and misconstrues the scope of a Petition for a New Trial under the Act of April 22, 1903, P. L. 245, 19 Purdon's Penna. Statutes Annotated (see footnote 13, supra).

[16] "We are of the opinion that the matters complained of by the Relator [Respondent] do not warrant the granting of a Writ of Habeas Corpus. Writ refused." (App'x. 718).

cation on the merits,[17] but merely an exercise of its discretion not to assume original jurisdiction[18] and "a fortiori did not involve adjudication on the merits by the Supreme Court of the United States" (R. 434) and (4) since Respondent had exhausted his remedies in the State Courts (with which Petitioners agree) and "that there is an absence of available State corrective process, or that circumstances exist rendering such process ineffective to protect . . . . [Respondent's] rights" (R. 436-437), the District Judge properly assumed jurisdiction under Section 2254 of the Revised Judicial Code, 28 U. S. C. Section 2254.

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[17] Curiously, in *Kennedy* v. *Burke*, 3 Cir., 173 F. 2d 544, an opinion by Biggs, C. J., a similar order was regarded as an adjudication of the merits of the matters alleged in the application. Likewise, *Gordon* v. *Scudder*, 9 Cir., 163 F. 2d 518, cert. den. 332 U. S. 830 (a capital case); Ex Parte Adamson, 9 Cir., 167 F. 2d 996,, cert. den. 334 U. S. 834 (a capital case; *Gryger* v. *Burke*, 334 U. S. 728.

[18] This ignores not only the Respondent's Petition for Certiorari (App'x. 734, 737-738), but also the action of the Pennsylvania Supreme Court subsequent to its decision in *Commonwealth ex rel. Paylor* v. *Claudy*, 366 Pa. 282, 77 A. 2d 350, assuming original jurisdiction in capital cases which had been affirmed by it (*Commonwealth ex rel. Darcy* v. *Claudy*, 367 Pa. 130, 79 A. 585, cert. den. 342 U. S. 837; *Commonwealth ex rel. Daverse* v. *Hohn*, ——— Pa. ———, ——— A. 2d ———, cert. den. 342 U. S. 812 (not reported), and *Commonwealth ex rel. Thompson* v. *Dye*, ——— Pa. ———, ——— A. 2d ———, cert. den. 342 U. S. 929 (not reported), (See also, *Commonwealth ex rel. Sheeler* v. *Burke*, 367 Pa. 152, 79 A. 2d 654), and the fact that the order did *not* contain, as the order in *Commonwealth ex rel. Paylor* v. *Claudy*, 366 Pa. 282, 287, 77 A. 2d 350, *did*, where orginal jurisdiction was declined, "without prejudice" and last, but not least, the substance of the order which clearly indicates *a determination on the merits.* Moreover, a lower court would not have the power to make a collateral inquiry into judgment of the Pennsylvania Supreme Court (*People ex rel. Stead, Attorney General* v. *Superior Ct. of Cook County et al.*, 234 Ill. 186, 84 N.E. 875; *People ex rel. Kerner, Attorney General* v. *Circuit Ct. of Sangamon County, et al.*, 354 Ill. 363, 188 N.E. 408; *People ex rel. Kerner, Attorney General* v. *Circuit Ct. of Will County et al.*, 369 Ill. 438, 17 N.E. 2d 46; *State ex rel. Galbraith, Attorney General* v. *Superior Ct. of Pinal County et al.*, 22 Ariz. 452, 197 Pac. 537; *Skipper* v. *Schumacher*, 118 Fla. 867, 160 So. 357; *Collier et al.*, v. *King*, 118 Fla. 866, 160 So. 926; 25 Am. Jur., Habeas Corpus, Sec. 110; 12 R.C.L., Habeas Corpus, Sec. 39; 39 C.J.S., Habeas Corpus, Sec. 56.

It is abundantly clear that the issue involved in this proceeding *was* presented to and adjudicated by the trial court; that it *was* presented to and adjudicated by the Pennsylvania Supreme Court on the direct appeal;[19] and that, since the Act of April 22, 1903, P. L. 245, has replaced *coram nobis* in first degree murder cases (*Commonwealth* v. *Harris,* 351 Pa. 325, 342, 41 A. 2d 688, *supra*), it was presented to and adjudicated by the Pennsylvania Supreme Court on the application for a new trial under that Act. Likewise, it is abundantly clear that the corrective processes supplied by Pennsylvania were wholly adequate to protect the Respondent's rights. Therefore, if the District Judge had followed the principles of *Frank* v. *Mangum,* 237 U. S. 309, 329, he should have declined to entertain the application regardless of the Respondent's self-made "urgency". Had there been any doubt in the mind of the District Judge to whom the application was made as to whether the principles of *Frank* v. *Mangum,* 237 U. S. 309, 329, supra, were applicable, he should, instead of accepting the allegations of the Respondent, have determined for himself whether or not the issue had been raised, whether or not the corrective processes were adequate and whether or not it had been disposed of in the direct and ancillary appellate proceedings. If those matters were determined in the affirmative, as they should have been, the application should have been declined without the formality of a rule to show cause, and more especially so where the petition disclosed on its face that the entire matter had just been reconsidered by the Pennsylvania Supreme Court. After having issued the rule to show cause, and retaining juris-

[19] A contrary conclusion would require a complete disregard of the Petition for Reargument (App'x. 643-656) and the order entered thereon (App'x. 657), (the Court of Appeals, incidentally, although it was before them, did not mention the Petition for Reargument) as well as the Petition for a New Trial (App'x. 658-661) and the order entered thereon (App'x. 662).

diction pending determination of the Petition for Certiorari in this Court which, by necessity, conceded the adequacy of the remedy, the denial thereof without comment, should have convinced the District Judge, upon application by the Petitioners, that the Rule to Show Cause should be discharged.[20] Neither the "absence of available State corrective processes" clause, nor "the existence of circumstances rendering such process ineffective to protect the rights of the prisoner" clause of Section 2254 of the Revised Judicial Code which are *limitations* and not, as the Court of Appeals held, *enlargements*, upon the "exhaustion of remedies" clause, authorize an avoidance of the rule of restraint which was characterized in *Frank* v. *Mangum*, 207 U. S. 309, 329, supra, as ". . . a principle of right and of law, and therefore of necessity." To hold, as the Court of Appeals held, would render completely nugatory the purpose of the "exhaustion of remedies" clause which, as evidenced by the last paragraph of Section 2254 of the Code, presupposes the existence of an adequate method (*Woolsey* v. *Best*, 299 U. S. 1) by which "the question presented" may be raised. In short, those two clauses simply mean that a District Judge may, without more, grant a writ where the issues could *not* have been raised and it appears that the matter *cannot* presently be raised or, if it can, that for some reason, relief *cannot* be granted. Congress never intended that where, as here, State corrective processes are adequate, and they have been exhausted, a District Judge should, as the Court of Appeals held, in the absence of an expression from this Court,[21] avoid

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[20] See *Darr* v. *Burford*, 339 U. S. 200, 215, and cases cited in footnote 10, supra. It should also be observed that the decision of the seven Judge Court in *United States ex rel. Smith* v. *Baldi*, 87 F. Supp. 338, now pending before this Court, had been filed when the motion to discharge the rule was disallowed.

[21] *Darr* v. *Burford*, 339 U. S. 200, 215; Cf., *Ex Parte Royall*, 117 U. S. 241, 254.

the rule of restraint—the undoubted purpose of the "exhaustion" clause—by the simple expeditent of holding that they were ineffective simply because his concept of "fundamental fairness" differs from that of the State tribunals which this Court has declined to disturb.[22]

2. The Court of Appeals avoided the Rules of Decision Act which would have required them to apply the law of the case as established by the prior litigation in the State Courts by holding that the issue was not decided in that litigation. The Petitioners have demonstrated graphically, it is felt, that the basic issue—relevancy (this was not open to inquiry on habeas corpus (Cf., *Collins* v. *Johnston,* 237 U. S. 502)) of the evidence alleged to have been suppressed —was, by necessity, adjudicated by the Pennsylvania Courts and adversely to the Respondent.[23] That became the law of the case and it was the duty of the District Judge and the Court of Appeals to apply it.[24] The Court of Appeals, however, ignored the decision in the *Hough* case and the *Williams* case (see footnote 23), which, apart from the law of the case, they were also required to follow, under the Rules of Decision Act, and rested their conclusion with respect to materiality upon a decision of the Pennsylvania

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[22] *Bailey* v. *Stoutamire,* 5 Cir., 155 F. 2d 754 (a capital case).

[23] The decision was consistent with the decision of the trial court in the companion case of *Commonwealth* v. *Hough* (App'x. 872, 877), affirmed by the Pennsylvania Supreme Court (App'x. 882-889), opinion reported at 358 Pa. 247, 56 A. 2d 84. Although not cited, the decision followed the rule established two decades ago in *Commonwealth* v. *Williams,* 307 Pa. 334, 160 Atl. 602 (a capital case) where it was held that evidence which was *not* a defense was not admissible in mitigation. A fortiori, since the Court had held on direct appeal (App'x. 575-642) that the identity of the person who fired the fatal shot was immaterial as to guilt, the evidence alleged to have been suppressed was *not* relevant to the issue of penalty. Moreover, the decision could have rested on the contention made by the Prosecuting Attorney on the direct appeal (App'x. 564), viz., there was nothing to show its relationship to the proceeding.

[24] Rules of Decision Act, Act of June 25, 1948, c. 646, 62 Stat. 944, 28 U.S.C.A. Section 1652; *West* v. *American Telephone and Telegraph Co.,* 311 U. S. 223, 238; *Walsh* v. *White,* 338 U. S. 804, reversing 174 F. 2d 49.

Supreme Court in the case of *Commonwealth* v. *Chambers*, 367 Pa. 159, 79 A. 2d 201, rendered some seventeen months after its decision in *Commonwealth* v. *Almeida*, 362 Pa. 596, 68 A. 2d 595, and nearly a year after its refusal of a writ of habeas corpus. That decision, however, is not factually apposite. There, the *Commonwealth* had introduced a confession in which it appeared that Chambers (defendant) had not participated in the actual infliction of the injuries which caused the death of the victim. The Trial Judge, however, charged the jury in such a manner that this evidence was virtually withdrawn from the jury's consideration. The Pennsylvania Supreme Court reversed. Obviously, that is different from the proposition for which it was cited and relied upon by the Court of Appeals. In the event, however, of any conflict, it was the duty of the District Court and the Court of Appeals, under the law, *to take the law of the case as established by the prior litigation.*

3. The ultimate finding[25] upon which the District Judge based the conclusion that the Respondent had been denied due process was clearly erroneous. The Court of Appeals seems to have erroneously[26] applied the "substantial evidence" test[27] but, even under that test, in view of the extreme weakness of the Respondent's evidence as opposed by the clear, positive, uncontroverted, credible and convincing evidence of the Petitioners, the finding should have been reversed.[28] Fortunately, however, this Court has the power

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[25] "6. The Assistant District Attorney deliberately and wilfully suppressed at Relator's [Respondent's] trial material evidence which would have warranted the inference that a uniformed police officer fired the shot which killed Ingling" (R. 407). This was characterized by the Court of Appeals (F.N. 17, R. 423) as a finding of fact.

[26] Rule 52 (a), Federal Rules of Civil Procedure, 28 U.S.C.A. 52 (a); *United States* v. *United States Gypsum Co., et al.*, 333 U. S. 364, 394-395.

[27] This was a departure from the rule announced by the same court and the same opinion writer in *Johnson* v. *Dye*, 3 Cir., 175 F. 2d 250, 255, reversed on other grounds, 338 U. S. 864.

[28] Cf., *Gelb et al.* v. *Federal Trade Commission*, 2 Cir., 144 F. 2d 580.

to correct an erroneous finding where an obvious *mistake* has been made.[29] Such a mistake was here made.

The burden rested upon the Respondent to prove the allegations upon which his claim rested by a preponderance of the evidence.[30] The District Judge, however, appeared to feel that the burden was upon the Petitioners to disprove Respondent's allegations. This is, to some degree, reflected by the comments of the District Judge[31] (R. 149), as well as the ultimate finding (see footnote 25, *supra*) which not only totally ignores (1) positive, credible and uncontroverted evidence that the controversial bullet, which is the very warp and woof of the Respondent's case, was *not* the bullet which killed Ingling (see footnote 3, *supra*), (2) the critical and material variance in the location of the bullet between Respondent's proceedings in the State Courts and this Court and in the District Court (see footnote 4, *supra*),[32] (3) documentary evidence (App'x. 562-564, 1239, 1302) indicating more convincingly than the spoken word possibly could the Prosecuting Attorney's theory of the case which is completely incompatible with deliberate supression, but also rests upon vital subsidiary findings based upon inferences unwarranted by the evidence. To illustrate, Finding No. 25 places an unwarranted interpretation on Del Torre's use of the word "mushrooming" (R. 150-151) and totally ignores Dr. Wadsworth's testimony (R. 326) that the controversial bullet was *not* "mushroomed", as well as Spangler's report (R. 83-84) introduced by the Respondent which significantly contained no mention of "mushrooming." Finding No. 26 is predicated on a statement made by Del Torre

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[29] *United States* v. *United States Gypsum Co. et al.*, 333 U. S. 364, 395.

[30] *Johnson* v. *Zerbst*, 304 U. S. 458, 468-469; *Hawk* v. *Olson*, 326 U. S. 271, 279.

[31] "The Government is on trial, not Almeida."

[32] It is obvious that the theories are incompatible. If one is right, the other is wrong. The District Judge, in effect, found that the former theory was wrong.

(R. 134) in response to a question by the District Judge, but it completely ignores the testimony immediately following (R. 135-136) also in response to questions by the District Judge, and by counsel for Petitioners (R. 158) that he (Del Torre) had first come in contact with the bullet in August 1950, two and one-half years after Respondent's trial, and *after* the proceeding had been instituted in the District Court. Of course, anyone, then, would realize that it was *vital* for the purpose of refusing the claim upon which the application to the District Court rested. Finding No. 28 imputes a sinister purpose to the Prosecuting Attorney's instruction to Spangler prior to his testimony in the trial of Smith, but totally ignores Spangler's testimony (R. 95, 96. App'x. 1265) that he was not competent to testify with respect to that matter.[33] It is evident that the Prosecuting Attorney's desire to eliminate that possibiliy of trial error motivated his observation to Spangler.

It is clear that a mistake was made in the controlling ultimate finding (see footnote 25, supra) which should, in the interest of justice, be corrected.

Conclusion

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

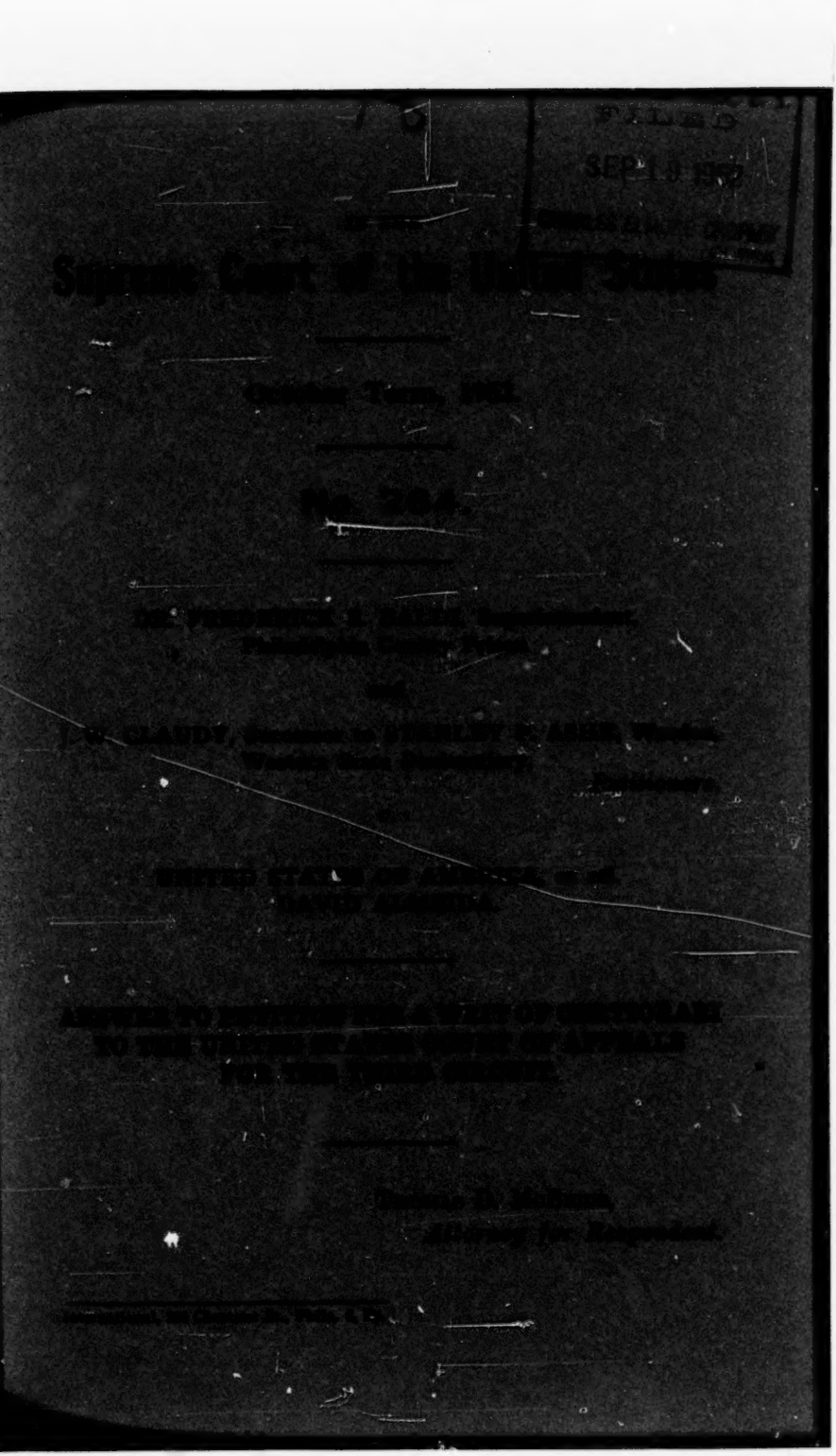
Respectfully submitted,

ROBERT E. WOODSIDE,
Attorney General of Pennsylvania.
By RANDOLPH C. RYDER,
Deputy Attorney General of Pennsylvania.

AUGUST 8, 1952.

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[33] It must be borne in mind that Spangler was testifying in behalf of the Respondent in the District Court.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 264.

DR. FREDERICK S. BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON

AND

J. W. CLAUDY, SUCCESSOR TO STANLEY P. ASHE, WARDEN, WESTERN STATE PENITENTIARY,

Petitioners,

v.

UNITED STATES OF AMERICA, EX REL. DAVID ALMEIDA.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. Whether willful suppression of material evidence by the prosecuting attorney in a capital trial in a State court is a violation of the due process clause of the Fourteenth Amendment?

2. Whether there is substantial evidence in this record to sustain the findings of the Federal District Court affirmed by the Court of Appeals that the State prosecuting attorney willfully suppressed material evidence at Respondent's trial for his life?

3. Whether previous denial of certiorari by this Court to review a State court decision precludes a Federal District Court from later entertaining an application for habeas corpus involving same questions where the decision of the State court did not pass upon the merits of the Federal constitutional issue presented to it?

COUNTER-STATEMENT OF THE FACTS.

The rather considerable liberties which the Petition takes in its tendentious review of the evidence in this case requires Respondent to set forth in some detail an accurate resume.

This case presents, not an extraordinary procedural situation, as the Petition of the Commonwealth suggests, but the one contemplated by Sections 2241 and 2254 of the Judicial Code (28 U. S. C., sec. 2241, 2254) wherein a defendant, improperly sentenced to death in a State court, completely exhausted the available State corrective processes including petition for certiorari and then applied to the United States District Court for habeas corpus. The writ was granted because the District Court found, on ample evidence, that during the trial the prosecuting attorney had willfully suppressed material evidence helpful to the defendant on a crucial issue; that such suppression constituted denial of the fundamental right to a fair trial guaranteed by the due process clause of the Fourteenth Amendment thereby ousting the jurisdiction of the State court to impose sentence of death. The Court of Appeals affirmed.

On January 30, 1947, Respondent (Almeida), together with Edward Hough and James Smith, committed an armed robbery in a grocery store at 1924 Fairmount Avenue in the City of Philadelphia.

The evidence shows that Almeida was armed with a .45 calibre revolver (Appx. 68, 164, 991), Hough carried a .45 automatic (Appx. 67, 217), and Smith a .22 calibre revolver

(Appx. 1011), and that neither Hough's nor Smith's gun was fired at the scene of the crime (Appx. 1270, et seq.).

Police arrived while the robbery was still in progress. Almeida, followed by Hough, fled from the store to join Smith, who had been waiting in the car outside. As Hough ran toward the car, Cecil Ingling, an off-duty policeman in civilian clothes, attempted to stop him. At that moment Ingling was shot through the head. He died soon afterwards.

The bandits escaped from the scene but a few blocks away Hough fell out of the car and was captured by pursuing police. Several months later, Almeida and Smith were captured in New Orleans and returned to Philadelphia for trial.

Hough, Almeida and Smith were all indicted for the murder of Cecil Ingling. Hough entered a general plea of guilty to murder, was found guilty of murder in the first degree by a three judge Court and was sentenced to death. This sentence has not been executed. He has testified against both his accomplices as a witness for the prosecution.

Almeida pleaded Not Guilty. At his trial Mrs. Ingling (Appx. 293, 1150) and her two children, Leon (Appx. 302, 1161) and Jean (Appx. 300, 1157) testified that it was Smith who shot Ingling. Hough, on the other hand, testified that Almeida shot Ingling (Appx. 79, 1001).

In short, at Almeida's trial it was intentionally made to appear by the prosecutor that Almeida (according to Hough's testimony) or one of his accomplices (Smith, according to the Inglings) had shot Ingling. The jury found Almeida guilty of murder in the first degree and *fixed* the penalty at death rather than life imprisonment. 18 P. S. 4701 (R. 414 N. 2).

Ten days later, Smith, the third member of the bandit trio, was put on trial. At the trial of Smith the following significant evidence was uncovered for the first time.

1. Edward H. Ahrndt, a city detective, arrived at the scene of the crime five minutes after it occurred and found a spent bullet on the sidewalk just outside the door of the market. He turned this bullet over to Lt. George R. Spangler, the city ballistic expert (Appx. 1300).

2. Lt. Spangler identified that bullet as a .38 calibre S. & W. special, the type used by the police (Appx. 1283). He also testified that the diameter of a .38 calibre bullet is slightly more than nine millimeters; of a .22 calibre bullet, 5.6 millimeters; and of a .45 calibre bullet, 11.4 millimeters (Appx. 1290-2). He testified that he turned that .38 calibre bullet over to the police chemist, Dr. Lampert (Appx. 1293).

3. Dr. Lampert testified (Appx. 1311) that he found blood on that bullet.

4. Dr. William S. Wadsworth, Coroner's Physician, testified that the bullet which killed Officer Ingling passed through his head and that the wound of entrance in the bony structure of the head was 10 millimeters, measured by a cone graduate, (900 (3)-900 (4)) and that there were no powder marks around it (900 (5)).

5. Officer Mark McGinley testified that he arrived at the scene while the bandits were still there, that he fired several times in the direction of their car and saw someone fall to the ground (Appx. 1244, 1245) and that he did not know whether he hit or killed anyone or not (Appx. 1210, 1211). The only man who fell was Ingling.

6. Lieutenant Spangler testified that he received for examination the .22 calibre revolver of Smith and the .45 calibre automatic carried by Hough and that neither of them had been fired at the scene of the crime (Appx. 1270, et seq.). He also testified that he received from Detective McGurk two .45 calibre bullets recovered from the ceiling inside the supermarket (Appx. 1279). (Almeida was the only one who fired a gun inside the market (Appx. 1015)).

This evidence therefore demonstrated (1) that Ingling could not have been killed by any of the guns carried by the robbers because a .45 calibre bullet (being 45/100 of an inch or 11.4 millimeters in diameter) could not enter bony structure and leave a 10 millimeter hole and neither of the other guns had been fired; (2) that he could have been and very likely was killed by a police bullet and (3) that this information (in report form) was in the possession of the police and the District Attorney for months prior to Respondent's trial. Smith was found guilty of first degree murder but was given a life sentence by the Jury.

The Commonwealth's Petition suggests contrary possible conclusions from this evidence. Even if there are, that is not material in a suppression case and even so, the suggestions of the petition are contradicted by the Record. The petition suggests that the police did not arrive at the scene until after Ingling had been shot. To the contrary, Hough testified at Almeida's trial (78/9) that Smith had been shot by the police before Ingling was shot. Alfred J. McClernan, an employee of the Supermarket, testified (187-191) that the police had arrived on the scene and several shots had been fired before he saw Ingling fall. Officer McGinley testified (207, et seq.) that he drove his car up beside the bandits' car in an attempt to block their escape, and fired at a man getting into the car. Frank Treadway, a customer in the store, testified that the police arrived while Almeida and Hough were still in the store (Appx. 789, 1304). Treadway was not called to testify at Almeida's trial.

The Commonwealth's petition suggests (p. 13) that the testimony of Dr. Wadsworth, Coroner's Physician, that the fatal shot was fired a minimum distance of three feet, "corroborates" the testimony of Jean Ingling that she saw the man shoot her father from a distance of four feet. It is to be noted that this testimony is equally consistent with the hypothesis that the shot was fired from ten feet away or more (Dr. Wadsworth's testimony, Appx. 20-22). And

it is also to be noted (1) that Jean Ingling first identified Hough as her father's killer (1306), and later positively identified Smith as her father's killer (157), and (2) that her version of how her father was killed completely contradicts that of Hough, who testified (79/80) that it was Almeida who shot Ingling and that he did it by leaning over Hough's shoulder so that his pistol must have been within a foot or less of Ingling's head.

The Commonwealth's petition suggests that the testimony in the District Court of Lt. Del Torre and Dr. Wadsworth, to the effect that the markings on the crucial bullet are such that it could not have been the one which killed Ingling, is significant (p. 9, N. 3). It is to be noted that this testimony (R. 129-132 and 313, 314) was based on an examination of the bullet made November 21, 1950, nearly three years after the occurrence in question, and that the foundation of their conclusion is so meager as to make the conclusion itself sheer conjecture (R. 126-130, R. 314-318).

The Commonwealth's Petition (p. 10, N. 4) suggests that an apparent variance in Respondent's position as to the location of the .38 calibre bullet found by Detective Ahrndt "completely shatters" the theory that Officer McGinley fired the fatal shot. Whether in fact he found the bullet directly in front of the American Store door, or ten feet to the East, Detective Ahrndt described the location even more significantly in these terms: "directly on a line where the body was laying" (R. 56). That fact is clear. It is also clear, that the bullet was a .38 calibre police bullet; it is clear that of all the types of guns and bullets involved in this affair, this was the only one of the size of the wound of entrance in the bone of Ingling's head (R. 310); it is clear that of all the bullets in evidence, this one alone had blood on it (R. 108); it is clear that Officer McGinley admitted in his police report (R. 374) that he fired in the direction indicated and then saw someone fall (R. 374) and finally it is clear that whoever killed Ingling, it could not possibly have been Almeida.

All of the foregoing evidence was in the possession of the District Attorney for months prior to the trial of Respondent. Detective McGurk filed a report on the finding of the .45 calibre bullets fired by Almeida in the ceiling of the supermarket. Detective Ahrndt filed a report on the discovery of the bloody .38 calibre bullet (R. 65). Lieutenant Spangler filed a report on his examination of the bullet found by Ahrndt showing it was a .38 calibre Smith & Wesson special, and that Dr. Lampert had found blood on it (R. 83, 108). Officer McGinley made a report relating that he fired at the bandits' car and saw someone fall (R. 373, et seq.). Captain Kelly informed the Assistant District Attorney who prosecuted all three cases about these findings prior to the trials (R. 333). When Lt. Spangler was later subpoenaed by the defense in the trial of Smith, the Assistant District Attorney instructed him not to mention the blood on the bullet (R. 89, 90). Counsel for Respondent asked the Assistant District Attorney about the existence of such bullets and received no information (R. 176). This evidence was never yielded willingly by the prosecutor but was uncovered by counsel for Smith at the later trial.

Under the law of Pennsylvania it is the duty of the trial jury to *fix* not only the degree of murder, but also the penalty. Act of 1939, June 24, P. L. 953, § 701, 18 P. S. 4701. The latter function is no less to be performed on the basis of trial evidence than the former and, therefore, not only evidence relevant to guilt but also that which is relevant only to the penalty—the character of the offender, the atrocity of the crime, whether he was a direct or only an indirect cause of the death—is material in such a trial.

Therefore, the Court below has properly found that the District Attorney deliberately concealed material evidence at Respondent's trial; that he asked the jury to sentence Respondent to death on untruthful testimony while he possessed the undisclosed true evidence which later persuaded the Smith jury to fix a life sentence.

REASONS FOR NOT GRANTING THE WRIT.

The Petition of the Commonwealth suggests that the writ ought to be granted because the court below erred in eight specified instances. In answer, Respondent respectfully submits (1) that none of the allegations of error is correct and (2) that none of the questions presented warrants consideration by this Court on certiorari.

The first error alleged is in affirming the judgment of the District Court. This is alleged to follow from the others and will therefore be considered last.

Specifications Nos. 2 through 5 allege error in holding that the Pennsylvania Courts here involved did not consider or decide Respondent's federal questions in various proceedings. By way of reply, Respondent can only invite this Court to examine the records of the proceedings referred to which are appended. Such examination reveals clearly, contrary to Specification No. 2, that the issue of suppression was not raised in the motion for new trial. Only matters of Pennsylvania law are alleged (Appx. 1320, et seq.). Examination of the opinion of the trial Court of Oyer and Terminer on that motion reveals that no federal issue was considered, contrary to Specification No. 3. Contrary to Specification No. 4, the opinion of the Supreme Court of Pennsylvania (Appx. 575, et seq.) reveals that no federal issue was considered. Since it was not a matter of record it could not have been. Likewise in the petition for new trial in the Supreme Court of Pennsylvania such contentions could not be considered because they did not relate, as required by the Act of 1903 (cf. petition p. 6), to the *guilt* of the defendant but rather to the *penalty*. Finally, and contrary to Specification No. 5, this issue was not decided by the Pennsylvania Supreme Court on Respondent's petition for habeas corpus in that Court. That petition was summarily denied, without hearing and without opinion. The Supreme Court of Pennsylvania has and frequently exercised the power to refuse, as a matter of discretion,

original jurisdiction in habeas corpus. Such, as pointed out by the court below, was the case here (Appx. 430, et seq.).

As to Specification No. 6:

The Commonwealth does not contend that the District Court had no jurisdiction to entertain Relator's Petition for Habeas Corpus, but that it is a matter of discretion for the District Court and that under the circumstances of this case that Court's action in entertaining the petition and entering into a hearing of the case was an abuse of discretion. This conclusion is predicated upon the assumptions (1) that the issue presented to the District Court on Habeas Corpus had already been adjudicated adversely to petitioner by the State courts, and (2) that this Court's subsequent denials of certiorari to the State decisions expressed the opinion of this Court that there was no merit in petitioner's contentions and thereby precluded reexamination of the issues by any lower Federal Court under the "rule of restraint" stated in *Frank v. Mangum,* 237 U. S. 309. Respondent denies both of these assumptions, and further submits that even if they were both true the result should nevertheless be the same under the rule of *Moore v. Dempsey,* 261 U. S. 86.

The Court of Appeals held that the Pennsylvania Supreme Court did not pass on the merits of the petitioner's contentions; rather that the denial of his petition for habeas corpus in that court was a discretionary refusal to consider the case on the merits (Appx. 470, et seq.). This being the case, the Pennsylvania decision rested on an adequate nonfederal ground, hence this Court had no jurisdiction to review it on certiorari, therefore the denial of certiorari could have no relation to the merits of the case. Therefore under the rule stated in *House v. Mayo,* 324 U. S. 42, and *White v. Ragen,* 324 U. S. 760, the denial of certiorari could have no effect on Respondent's subsequent petition for habeas corpus in the District Court.

But even assuming the Supreme Court of Pennsylvania passed on the merits of the federal question presented

in paragraphs 29 and 31 of the petition for habeas corpus, this Court's denial of certiorari to that decision is not a bar to a subsequent application for habeas corpus in the District Court.

Petitioner, in support of its contention to the contrary, relies on six decisions of this Court, none of which support his position. The holding of *Frank v. Mangum,* 237 U. S. 309, is that while the decision of a state court is not res judicata, it may be taken as true until the petitioner does more than merely allege that his trial was vitiated by circumstances dehors the record. Unless this decision is to be considered inconsistent with the later ruling in *Moore v. Dempsey,* 261 U. S. 86, it must be confined to the facts as stated. In *Moore v. Dempsey, supra,* this Court declined to review by certiorari a decision of the Supreme Court of Arkansas which had passed on the merits of the petitioner's federal claim. Thereafter this Court reversed the District Court's *refusal* to grant habeas corpus on a petition alleging facts to show that the trial court had violated his constitutional rights, saying (p. 92):

> "We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a judge of the United States to escape the duty of examining the facts for himself when if true as alleged, they made the trial absolutely void."

Salinger v. Loisel, 265 U. S. 224, and *Wong Doo v. United States,* 265 U. S. 239, hold only that the district court may dismiss without hearing a petition which obviously amounts to an abuse of the Writ, i.e., where a prior petition for habeas corpus (not for certiorari) containing the same allegations has already been denied in the *federal* courts.

Ashe v. Valotta, 270 U. S. 424, allows dismissal of a petition which alleged no violation of federal constitutional rights but merely a violation of state law.

In *House v. Mayo,* 324 U. S. 42, this Court reversed the District Court's refusal to grant habeas corpus after a denial of certiorari, saying:

> "The District Court also referred to a denial by this court of a petition for certiorari, filed here after the denial by the Florida Supreme Court of one of the applications for habeas corpus. See House v. Mayo, 322 U. S. 710. The District Court thought that this was an expression 'of the opinion that no meritorious question is presented by the matters of which the petition here complains'. But as we have often said, a denial of certiorari by this court imports no expression of opinion upon the merits of a case."

In that case the Florida Court held that no remedy was available to petitioner in the state courts. The Supreme Court of Pennsylvania has, in effect, held the same in this case.

The Commonwealth suggests that the courts below misinterpreted the "exhaustion of remedies" clause of Section 2254 of the Judicial Code in holding that "the absence of corrective process" clause and the "circumstances rendering process ineffective" clause were enlargements on the "exhaustion" clause and not limitations. The grammar of the Act and its obvious purpose make this contention frivolous. It provides that no writ shall be granted unless (1) State remedies have been exhausted *or* (2) there is an absence of such remedies *or* (3) circumstances exist making such remedies ineffective. The very disjunctive construction of the sentence indicates clearly that if any one of the three conditions is met the District Court may entertain an application for the writ. Nor is this interpretation inconsistent with the holding of this Court in *Frank v. Mangum, supra.* The Petitioner, however, has attempted to magnify the rule of that case far beyond anything indicated in the Court's opinion, so that it becomes a complete bar to federal habeas corpus for state prisoners. If this strained

construction of that decision be accepted then the only conclusion which rightly follows is that the case was implicitly overruled by *Moore v. Dempsey, supra,* and completely superseded by Section 2254 of the Revised Judicial Code of 1948.

It is the settled law of this Court that a denial of certiorari imports no expression of opinion upon the merits of the decision sought to be reviewed. *United States v. Carver,* 260 U. S. 482; *House v. Mayo,* 324 U. S. 42; *Sunal v. Large,* 332 U. S. 174; *Maryland v. Baltimore Radio Show,* 338 U. S. 912; *Agoston v. Pennsylvania,* 340 U. S. 844; *Darr v. Burford,* 339 U. S. 200.

Chief Justice Taft spoke authoritatively for this Court in *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U. S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case certainly comes under neither head."

And by Mr. Chief Justice Vinson, addressing the American Bar Association Assembly (A. B. A. Rept. Vol. 74, p. 88):

> "All other cases come within the court's discretionary jurisdiction, and, as has been the custom for some years past, the court takes such cases only when at least four justices feel that public importance of the question presented requires its consideration by the Supreme Court."

It is also the settled law of this Court that before habeas corpus may be applied for in the district courts the petitioner must first have exhausted his state remedies which include a petition for certiorari in this Court. *Darr v. Burford,* 339 U. S. 200.

The Commonwealth now suggests that where a State court has decided the case on its merits and thereafter this Court denies certiorari, a Federal District Court may not reexamine the same contentions on habeas corpus.

If the proposition contended for is the law, it follows that no Federal District Court may ever issue a writ of habeas corpus to review the legality of a State confinement. That is: (1) If the Federal question is not raised or attempted to be raised in the State court, the Federal Court has no jurisdiction. (2) If the Federal question is raised in the State court then the doctrine of exhaustion requires a petition for certiorari. If certiorari is granted there will be a decision on the merits and hence no need for habeas corpus; if it is denied even for the reason that there is no conflict in the circuits or the question lacks sufficient public importance, still this constitutes a decision on the merits anyway. If this be the law, the habeas corpus act is meaningless. Besides, there are many other considerations which govern the decision on granting certiorari, such as ripeness of the question, improper or insufficient raising of question, etc. Also any new rule as to the effect of *refusal* of certiorari could hardly be restricted to habeas corpus cases but would apply to all other applications. The effect upon the discretionary jurisdiction of this Court would be easily foreseeable.

If a denial of certiorari is to be given the effect demanded by the Commonwealth's petition, then, in justice, this Court must undertake the task of examining the merits of each such petition. Only then might a denial of certiorari rightly be said, as it was in *Weber v. Ragen,* 176 F. 2d 579 (7 Cir.) cert. den. 338 U. S. 809, to be an expression of this Court's opinion that the constitutional ques-

tion raised is without merit. In that case Mr. Justice Minton (then Judge of the Court of Appeals for the Seventh Circuit) observed (176 F. 2d at p. 582):

> "We have been cited no case where the Supreme Court has denied certiorari and later decided that the United States District Court should take jurisdiction in a collateral proceeding in habeas corpus to consider the identical questions which had been presented in the direct proceeding where certiorari was denied."

It is a shame that the case of *Moore v. Dempsey,* 261 U. S. 86, was not cited to the Court. It is just such a case. In *Dowd v. United States,* this Court twice denied petitions for certiorari to review the action of the Supreme Court of Indiana, the first of which was by habeas corpus going to the validity of a conviction (327 U. S. 808, 90 L. ed. 1032) and the second of which complained of the action of the court in refusing a delayed appeal (330 U. S. 841, 91 L. ed. 1287). Thereafter petitioner brought a habeas corpus proceeding in the United States District Court, which, despite the previous actions of this Court, entertained the petition and ordered discharge. The Court of Appeals for the Seventh Circuit affirmed (180 F. 2d 212). Warden Dowd sought and was granted certiorari by this Court to review the action of the federal courts below. This Court specifically held that the District Court had jurisdiction (340 U. S. 206, 95 L. ed. 215).

The ruling sought by petitioner would either destroy the discretionary function of certiorari, or, as the Commonwealth would prefer, leave the states to be the ultimate judges of the federal constitutional propriety of their own actions. Cf. Frankfurter, J., in *Darr v. Burford,* 359 U. S. 200. The Commonwealth's contention must be rejected. The civilizing influence of occasional review by this Court of important questions involving state administration of criminal justice has been obvious to all. Every state should be compelled to play fair. It is not good enough to punish criminals by underworld methods.

The law as previously declared by this Court, and as here set forth, denying adjudicative effect to the denial of a petition for certiorari, leaves this Court free as it must be, even if only on the basis of time and endurance, to decide only those cases which it deems to be of great public importance; and leaves the district courts free, as the justice of individual litigation demands they should be, to determine substantial claims of violation of federal rights in state prosecutions, notwithstanding a prior denial of certorari.

Re: Specification No. 7.

The Commonwealth contends that the state courts in the instant case held the evidence alleged to have been suppressed irrelevant to the issues involved, and that the Court of Appeals, contrary to the law of the case and the prior Pennsylvania Law, held it was relevant.

The only proceeding in which this issue was or could have been raised was Respondent's petition for habeas corpus in the Supreme Court of Pennsylvania. In that proceeding (cf. pp. 29 and 31, Appx. pp. 706-7) Respondent specifically alleged violation of due process by willful suppression of evidence relevant to the penalty. That petition, however, was denied without hearing by the Supreme Court of Pennsylvania.

No Pennsylvania court in this case has held either that that evidence was not relevant or that it was not suppressed. The same evidence was admitted in the same court just ten days later in the companion case of *Commonwealth v. Smith*[1] (cf. Charge of the Court, Appx. 1426). It is well established as the law of Pennsylvania that all circumstances bearing on the penalty are admissible to aid the jury in its function of deciding the sentence. *Commonwealth v. Stabinsky*, 313 Pa. 231; *Commonwealth v. Wooding*, 355 Pa. 555; *Commonwealth v. Simmons*, 361 Pa. 391; *Commonwealth v. Chambers*, 367 Pa. 159.

1. Not to be confused with *Smith v. Baldi*, 343 U. S. 973.

Since the issue on all the post-trial proceedings was the double one of (a) suppression of (b) relevant evidence and since none of the Pennsylvania courts involved in this proceeding has explicitly held the evidence involved either not suppressed or irrelevant, the Commonwealth is not at liberty to choose as the holding of any of the courts involved, the matter of relevancy, for which there is no warrant in the record or in the prior Pennsylvania Law.

Furthermore, as the Court of Appeals pointed out, since the Pennsylvania Supreme Court denied Respondent's petition for habeas corpus without a hearing, the allegations of that petition, including that of suppression of evidence therein specified must be taken as true. *Williams v. Kaiser,* 323 U. S. 471; *White v. Ragen,* 324 U. S. 760.

Finally, Respondent submits that no proper question for consideration on certiorari is presented by this record. No important question of constitutional law is in dispute. The Commonwealth does not contest the ruling that deliberate suppression of relevant evidence is a violation of the due process clause.

The determination of Specifications No. 2 through No. 5 depends solely on a reading of the record as indicated. The issue presented by Specification No. 6 as to the effect of a denial of certiorari upon a subsequent application for federal habeas corpus is already before this Court for adjudication in the case of *United States ex rel. Smith v. Baldi,* reargument ordered 343 U. S. 973, and need not be reconsidered here. As to the issue raised in Specification No. 7, it is clear that no Pennsylvania court in this case did decide that evidence tending to show who killed Ingling was not relevant to the penalty. This issue, once again, can be determined only by reading the record. Finally, the question of the sufficiency of the evidence in support of the findings of fact made by the courts below, presented in Specification No. 8 is only determinable by appraisal of the record.

In short, the Commonwealth is asking this Court, not to decide any serious or novel question of constitutional law, nor any matter of great public importance, but simply to redetermine the accuracy of the reading of the record and appraisal of the evidence on which two federal courts have already decided against it.

Such, as this Court has clearly pointed out, is not the function of the Writ of Certiorari.

For these reasons Respondent respectfully submits the above entitled petition should be denied.

Respectfully submitted,

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